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In the Supreme Court of the United States

KEVIN TRUDEAU, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit erred in holding—in conflict with principles of statutory interpretation articulated by this Court and with decisions of the D.C. Circuit—that a judge-made "sovereign-capacity" exception limits the scope of the Tucker Act, which confers on the Court of Federal Claims "jurisdiction to render judgment upon *any* claim against the United States founded * * * upon *any* express or implied contract with the United States," 28 U.S.C. § 1491(a)(1) (emphasis added).

PARTIES TO THE PROCEEDINGS

Petitioner Kevin Trudeau was the plaintiff-appellant in the court below. The United States was the defendant-appellee in the court below. There are no other parties.

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Administrative Office of the U.S. Courts, *2005 Annual Report of the Director: Judicial Business of the United States Courts* 309 (2006) 20

Consumer Affairs.com., "Trudeau Banned From Infomercials," (Sept. 10, 2004), *available at* www.consumeraffairs.com/news04/trudeau_infomercials.html 5

Federal Trade Commission, Dot Com Disclosures—*Information About Online Marketing* 8 (2000), *available at* http://www.ftc.gov/bcp/conline/pubs/ buspubs/dotcom/index. html 4

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13 *Williston on Contracts* § 38:15 (4th ed. 2006) 5

INTRODUCTION

Rather than simply apply the plain language of the Tucker Act—which confers jurisdiction on the Court of Federal Claims over "any" claim arising from "any" contract with the United States—the courts below dismissed petitioner's complaint for breach of a settlement agreement on the ground that the United Stated entered into the agreement in its sovereign, rather than proprietary, capacity. That holding contravenes principles of statutory construction repeatedly articulated by this Court, and conflicts with decisions of this Court holding that the term "any" is to be given its plain, ordinary, and unrestricted meaning, absent a clear indication to the contrary. *E.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Brogan* v. *United States*, 522 U.S. 398 (1998); *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125 (2002). Congress gave no indication that it wished to limit the jurisdiction of the Court of Federal Claims in this manner, and the courts below improperly imputed to Congress an intention that is nowhere expressed in the statute itself.

The decisions below also conflict with decisions of the D.C. Circuit recognizing that the Tucker Act means just what it says. In at least two recent cases, the D.C. Circuit held that private plaintiffs are *required* to bring claims against federal agencies for breach of litigation settlement agreements in the Court of Federal Claims rather than in district court. *Shaffer* v. *Veneman*, 325 F.3d 370 (D.C. Cir. 2003); *Brown* v. *United States*, 389 F.3d 1296 (D.C. Cir. 2004) (*per curiam*). Consistent with the plain language of the Tucker Act, the D.C. Circuit does not recognize the "sovereign capacity" exception applied by the Court of Federal Claims and the Federal Circuit.

Moreover, the question presented has significant implications beyond this case. That question can arise any time the United States enters into a litigation-related agreement with a private party, whether the United States is plaintiff or defendant, and even where the purpose of the agreement is to avoid litigation altogether.

This Court should clarify the scope of the Court of Federal Claims' subject-matter jurisdiction under the Tucker Act so that private parties who negotiate agreements with the United States will know whether they can rely upon the means of redress that Congress provided in the statute.

OPINIONS BELOW

The decision of the United States Court of Federal Claims (Miller, J.) is reprinted at Pet. App. 1a-22a and is reported at 68 Fed. Cl. 121. The Federal Circuit's judgment affirming the decision of the Court of Federal Claims is reprinted at Pet. App. 23a and is not otherwise published. The Federal Circuit's order denying rehearing is reprinted at Pet. App. 24a and is not otherwise published.

JURISDICTION

The Federal Circuit entered its judgment on June 13, 2006 and denied rehearing and rehearing *en banc* on September 8, 2006. The Chief Justice extended the time to file this petition to and including January 22, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Tucker Act provides, in relevant part, that "[t]he Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

STATEMENT

Petitioner Kevin Trudeau is a best-selling author and producer of television and radio infomercials promoting natural remedies for various health problems. In his publications and infomercials, petitioner has criticized federal agencies, including the Federal Trade Commission ("FTC"), for stifling discussion and marketing of natural

foods and health alternatives. This case involves the FTC's ongoing effort to discredit petitioner's marketing practices.

1. The FTC sued petitioner and others in the United States District Court for the Northern District of Illinois. The lawsuit alleged that petitioner had violated sections 5(a) and 12 of the Federal Trade Commission Act by engaging in false advertising in connection with his marketing of two products—Coral Calcium Supreme and Biotape. The district court subsequently entered a stipulated preliminary injunction forbidding petitioner to make allegedly misleading representations about Coral Calcium Supreme and Biotape, and later held petitioner in contempt of this injunction. After more than a year of litigation, the FTC agreed to settle all its claims against petitioner, including any additional remedies in connection with the court's contempt finding. That agreement was memorialized in a "Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief" (the "Stipulated Order").

For his part, petitioner agreed that he would not make misleading representations about the health benefits of his products or the conclusions of scientific tests or studies, among other things. He also agreed to pay the FTC $2 million and to notify the FTC of any changes of his name, residence, mailing address, telephone number, or employment status for a period of five years.

In exchange for these concessions, the FTC agreed to resolve all its claims against petitioner *without any admissions or findings of wrongdoing on his part.* Paragraph 8 of the Stipulated Order makes clear that petitioner was not found liable for false advertising:

> Defendants * * * expressly deny any wrongdoing or liability for any of the matters alleged in the Complaint and the civil contempt action. There have been no findings or admissions of wrongdoing or liability by the

> Defendants * * * other than the finding against Kevin Trudeau for contempt of [the earlier injunction].

In addition, Section XIII.D of the Stipulated Order provides that "[n]o portion of any payments under the judgment herein shall be deemed a payment of any fine, penalty or punitive assessment."

2. Five days after the district court entered the Stipulated Order, the FTC issued a press release entitled "Kevin Trudeau Banned from Infomercials: Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape." The press release described the restrictions on petitioner's future marketing activities—which were hardly a "ban"—as well as the $2 million judgment. The press release then quoted Lydia Parnes, Acting Director of the FTC's Bureau of Consumer Affairs, who stated that the Stipulated Order was "meant to shut down an infomercial empire that has misled American consumers for years * * * * Other habitual false advertisers should take a lesson; mend your ways or face serious consequences."

Apparently recognizing that the text of the press release was itself misleading—for example, by suggesting that petitioner had been found guilty of false advertising—the FTC dropped a "note" at the end of the document stating that "[t]his stipulated final order is for settlement purposes only and does not constitute an admission by the defendants of a law violation."[1]

The FTC's press release has been widely reported and is featured prominently on the FTC's website. Petitioner

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[1] At least when it is regulating others, the FTC does not consider such marginal disclaimers sufficient to avoid liability for false advertising. See Federal Trade Comm'n, *Dot Com Disclosures—Information About Online Marketing* 8 (2000), *available at* http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html ("If a disclosure provides information that contradicts a claim, the disclosure will not be sufficient to prevent the ad from being deceptive").

asked the FTC to edit the press release or remove it from the agency's website, but the FTC refused. Thus, the press release remains on the website to this day, with a link to the FTC's complaint against petitioner, at http://www.ftc.gov/opa/2004/09/trudeaucoral.htm (visited Jan. 19, 2007). Other websites repeated the assertions made in the FTC's press release.[2] A recent Google search of the terms "Kevin Trudeau" and "false" and "advertise"—key terms in the FTC's press release—generated more than 800 links. And more than 100 of those links include the word "habitual," which first appeared in the FTC's description of petitioner as a "habitual false advertiser."

The FTC's misleading characterizations of petitioner and the settlement agreement made their way into traditional media as well as Internet outlets. CNN, the *New York Times*, the *Los Angeles Times*, the *Washington Post*, and WTOP Radio all reported on the settlement, frequently lifting language from the FTC's press release, including the "habitual false advertiser" language.

3. Concerned about the inconsistency between the Stipulated Order and the FTC's public statements about the case—and what he viewed as the falsehoods in those statements—petitioner filed a complaint in the Court of Federal Claims. The complaint alleged that the FTC had breached the covenant of good faith and fair dealing in its settlement agreement with petitioner.[3] Specifically, peti-

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[2] See, *e.g.*, "Trudeau Banned From Infomercials," (Sept. 10, 2004), *available at* www.consumeraffairs.com/news04/ trudeau_informercials.html; "Is Infomercial King a Helper or Huckster?," (Jan. 13, 2006), *available at* http://www.abcnews. go.com/ Nightline/story? id=1503856.

[3] Every contract includes an implied covenant of good faith and fair dealing. See *First Nationwide Bank* v. *United States*, 431 F.3d 1342, 1349 (Fed. Cir. 2005); *Restatement (Second) of Contracts* § 205 (2006); 13 *Williston on Contracts* § 38:15 (4th ed. 2006). Petitioner's complaint alleges that the FTC breached that implied covenant by issuing a press release that eviscerated important contractual consideration bargained for by petitioner,

tioner alleged that the FTC press release falsely described him as a "habitual false advertiser" and falsely suggested that the Stipulated Order had found him liable for false advertising. According to the complaint, the press release thus "effectively deprived [petitioner] of the bargained-for benefits of the Agreement; it constituted a material breach of the Agreement; and it has caused [petitioner] substantial financial injury."

The Court of Federal Claims dismissed petitioner's complaint for lack of subject-matter jurisdiction. Pet. App. 2a. The court acknowledged that the Tucker Act confers jurisdiction on the Court of Federal Claims to decide "any claim against the United States founded * * * upon any express or implied contract with the United States." Pet. App. 12a (citing 28 U.S.C. § 1491). Nevertheless, the court dismissed petitioner's complaint on the ground that prior decisions of the Court of Federal Claims and the Federal Circuit carve out an *exception* to Tucker Act jurisdiction for claims arising from contracts entered into by the United States in its sovereign, as opposed to its proprietary, capacity. Pet. App. 21a-22a.

Following *Kania* v. *United States*, 650 F.2d 264 (Ct. Cl. 1981), the Court of Federal Claims asserted that "[t]he jurisdiction of the Court of Federal Claims does not extend to contracts entered into by the Government in its sovereign capacity that do not unmistakably subject the United States to damages in the event of breach."[4] Pet. App. 12a.

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namely, the FTC's agreement that "[t]here have been no findings or admissions of wrongdoing or liability" by petitioner.

[4] *Kania* involved a claim by a former officer of the Railway Express Agency, which had been the subject of an Interstate Commerce Commission investigation. The ICC referred the investigation to the United States Attorney's office, which later sought Kania's assistance. According to Kania, the Assistant United States Attorney offered, and he accepted, "transactional immunity"—the United States agreed not to prosecute Kania for his conduct at Railway Express in exchange for truthful grand jury

The court rejected petitioner's argument that the "sovereign capacity" exception described in *Kania* is limited to the criminal context, observing that the Court of Federal Claims has applied the exception for decades without discussing any distinction between civil and criminal cases. Pet. App. 13a-15a. The court also rejected petitioner's argument that *Kania* and its progeny were wrongly decided. Pet. App. 16a n.4.

Having concluded that the "sovereign capacity" exception could apply in this civil case, the Court of Federal Claims next determined that the FTC was acting in its sovereign, rather than its proprietary, capacity when it entered into the settlement agreement with petitioner. Pet. App. 18a-20a. According to the court, "[t]he FTC's

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testimony about the company. Kania testified before the grand jury and several months later learned that he was the target of a grand jury investigation himself. See 650 F.2d at 265-266.

Kania was indicted, but a federal district court dismissed the indictment on the ground that Kania had satisfied his obligations under the immunity agreement and thus could not be prosecuted. Kania then brought a Tucker Act claim in the Court of Claims, alleging that the United States breached its contractual agreement not to prosecute him. Although Kania had succeeded in obtaining a dismissal of the indictment, he claimed that he was entitled to damages for the expenses he incurred in preparing his defense. See *id.* at 266-267.

The Court of Claims dismissed Kania's complaint for lack of jurisdiction, asserting that notwithstanding the broad jurisdictional grant expressed in the statute, "[t]he contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of the minds." *Id.* at 268. To the contrary, Congress intended to waive federal sovereign immunity principally "where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services[—]transactions such as private parties, individuals or corporations also engage in among themselves." *Ibid.*

purpose when it initiated, litigated, and later settled, the enforcement action was clear: to protect the public against deception by ensuring, through the remedies afforded by the FTC Act, that advertising conveys truthful information to the public." Pet. App. 19a. The court concluded that, because the FTC "did not receive goods or services in exchange for its agreement to entry of the Stipulated Order," it acted "in its sovereign, not proprietary, capacity" when it agreed to the settlement. Pet. App. 20a.

The court next reviewed the Stipulated Order to determine whether it evidenced an "unmistakable promise to subject the United States to monetary liability." Pet. App. 20a (quotations omitted). Because the Stipulated Order "contains no provision for the payment of money damages in the event of a breach by the Government," the court concluded that the "sovereign capacity" exception to Tucker Act jurisdiction applies. Pet. App. 21a. Accordingly, the Court of Federal Claims dismissed petitioner's breach-of-contract complaint for lack of subject-matter jurisdiction. Pet. App. 21a-22a.

The Federal Circuit affirmed the dismissal of petitioner's complaint without opinion. Pet. App. 23a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for three reasons. *First*, the decisions below conflict with this Court's decisions holding that jurisdictional statutes must be applied according to their plain terms. See Sup. Ct. R. 10(c). *Second*, the decisions below conflict with recent decisions of the D.C. Circuit holding that private plaintiffs in cases such as this one must take their breach-of-settlement claims to the Court of Federal Claims, not district court. See Sup. Ct. R. 10(a). *Third*, the question presented is of considerable practical importance in many other cases. See Sup. Ct. R. 10(c).

I. The Decisions Below Rest On A "Sovereign Capacity" Exception That Contravenes The Plain Language Of The Tucker Act And Conflicts With This Court's Settled Rules Of Statutory Interpretation.

For 25 years, the Court of Federal Claims has applied a "sovereign capacity" exception to the Tucker Act, dismissing breach-of-contract claims against the United States where the court determines that the United States made the contract in its sovereign, rather than its proprietary, capacity. See, *e.g.*, *Awad* v. *United States*, 61 Fed. Cl. 281 (2004); *Houston* v. *United States*, 60 Fed. Cl. 507 (2004); *Doe* v. *United States*, 37 Fed. Cl. 74 (1996); *Drakes* v. *United States*, 28 Fed. Cl. 190 (1993); *Grundy* v. *United States*, 2 Cl. Ct. 596 (1983); *Bloemker* v. *United States*, 229 Ct. Cl. 690 (1981); *Kania*, 650 F.2d 264.[5]

This sovereign/proprietary distinction does not appear in the Tucker Act, which confers jurisdiction over "any" claim arising from "any" contract with the United States. The Court of Federal Claims departed from the text of the statute when it created the "sovereign capacity" exception, relying instead upon its assessment of what "Congress undoubtedly had in mind." *Kania*, 650 F.2d at 268. The result is that the Court of Federal Claims, with the acqui-

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[5] Citations to "Ct. Cl.," "Cl. Ct.," and "Fed. Cl." all refer to the court that is now known as the Court of Federal Claims. The original Court of Claims, established in 1855, exercised both original and appellate jurisdiction. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), assigned the original jurisdiction of the Court of Claims to the United States Claims Court and its appellate jurisdiction to the United States Court of Appeals for the Federal Circuit. Pursuant to the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992), the Claims Court was renamed the United States Court of Federal Claims. The Federal Circuit has adopted the decisions of its predecessors—including the Court of Claims—as its own precedents. *South Corp.* v. *United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

escence of the Federal Circuit, has redefined its own subject-matter jurisdiction by fiat, limiting the scope of the jurisdictional statute enacted by Congress.

In reaching this result, the decisions below conflict with this Court's holdings that "any" means "any" unless the relevant statute qualifies or limits that term. Those decisions also conflict with this Court's fundamental teaching that courts construing jurisdictional statutes must not disregard or evade the boundaries drawn in the statutory text. Under our Constitution, it is for Congress to determine the kinds of cases that lower federal courts—including the Court of Federal Claims—may decide.

A. The decisions below conflict with this Court's decisions holding that "any" means "*any*."

The decisions below limit the subject-matter jurisdiction of the Court of Federal Claims based upon a conclusion that the United States never consented to be sued for breach of a contract made in its sovereign capacity. This conclusion cannot be reconciled with the plain language of the Tucker Act, which confers jurisdiction on the Court of Federal Claims to decide "any" claim founded upon "any" contract.

1. It is common ground that "the United States, as sovereign, is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hercules, Inc.* v. *United States*, 516 U.S. 417, 422 (1996) (quotations omitted). This Court has held that the Tucker Act, 28 U.S.C. § 1491, represents a broad waiver of federal sovereign immunity. *United States* v. *Mitchell*, 463 U.S. 206, 215-219 (1983); *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 466 (1980) (*per curiam*); cf. *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 734 (1982). Thus, "[i]f a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *Mitchell*, 463 U.S. at 216.

The Tucker Act, in turn, provides that "[t]he Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, *or upon any express or implied contract with the United States*, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (emphasis added). Based on the historic jurisdiction of the original Court of Claims and the absence of any provision in the Tucker Act to the contrary, this Court has held that the Act applies only to claims for monetary relief. *United States* v. *King*, 395 U.S. 1, 2-3 (1969). Thus, if a private plaintiff sues the United States for breach of some constitutional, statutory, regulatory, or contractual obligation, and seeks monetary relief for that breach, the Tucker Act waives federal sovereign immunity and authorizes the Court of Federal Claims to hear the case.

As this Court observed in *Mitchell*, this waiver of sovereign immunity is "readily apparent" with respect to claims for breach of contract. 463 U.S. at 215. "The Court of Claims' jurisdiction over contract claims against the Government has long been recognized, and Government liability in contract is viewed as perhaps '*the widest and most unequivocal* waiver of federal immunity from suit.'" *Ibid.* (emphasis added). The Tucker Act "unmistakably" provides the consent to suit for contract claims. *Ibid.*

The scope of the Court of Federal Claims' jurisdiction to hear contract claims depends upon the scope of the jurisdictional grant in the Tucker Act with respect to such claims. Here, Congress expressed its wishes in the broadest terms: The Court of Federal Claims has jurisdiction over "any" claim arising from "any" contract with the United States. 28 U.S.C. § 1491(a)(1).

2. In this context, "any" necessarily means "any." As this Court has explained, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind." *United States* v. *Gonzales*,

520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). And this Court has rejected various attempts to restrict the scope of statutes that employ the broad term "any."

For example, the Court in *Brogan* v. *United States*, 522 U.S. 398 (1998), held that 18 U.S.C. § 1001—which criminalizes making "any false, fictitious or fraudulent statements" to a federal agency—does not admit an exception for the simple denial of guilt (the "exculpatory no"), as some courts had held. The petitioner there argued that the statute should not apply to the "exculpatory no" because that kind of statement does not "pervert governmental functions," the evil against which the statute was directed. *Id.* at 401-402. This Court rejected that argument on the ground that the literal text of the statute did not suggest a limitation on the kinds of false statements that were forbidden. *Id.* at 402-403. "[I]t is not, and cannot be our practice," the Court explained, "to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify the evil from something other than the text of the statute itself." *Id.* at 403.

Similarly, the Court in *Department of Housing & Urban Development* v. *Rucker*, 535 U.S. 125 (2002), rejected a proposed limitation on a statute requiring public housing agencies to use leases providing that termination could result from "any drug-related criminal activity" by members of a tenant's household on or off the leased premises. The Ninth Circuit had held that this statute did not permit termination of a lease where the tenant did not know of and had no reason to know of the drug-related criminal activity. *Id.* at 129-130. This Court rejected that interpretation of the statute, explaining that "Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement." *Id.* at 130-131.

As *Brogan* and *Rucker* demonstrate, "any" means "any" unless Congress expressly limits the scope of that term. And although this Court has noted that context can be important in interpreting the term "any," see *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 357 (1994), the context here provides no support for a "sovereign capacity" exception to Tucker Act jurisdiction.

Indeed, the statute nowhere limits the kinds of contract claims that can be decided by the Court of Federal Claims. See *Lewis* v. *United States*, 445 U.S. 55, 60 (1980) ("No modifier is present, and nothing suggests any restriction on the scope" of the relevant term). Far from limiting the range of contract claims that support Tucker Act jurisdiction, the statute applies broadly to claims based on *express or implied* contracts and claims for *liquidated or unliquidated* damages.

It is no answer to say that statutory waivers of immunity must be strictly construed, for the Tucker Act "waives the Government's immunity from suit in *sweeping language*." *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951) (emphasis added) (interpreting the statutory exceptions to waiver in the Federal Tort Claims Act). Even where the relevant statute contains exceptions to the waiver of immunity, this Court has been careful not to give "unduly generous interpretations of the exceptions" that would "defeat[ ] the central purpose of the statute." *Kosak* v. *United States*, 465 U.S. 848, 854 n.9 (1984). As this Court explained just last Term, the principle favoring strict interpretation of waiver statutes is "unhelpful" where the "sweeping language" of the statute makes clear Congress' intent to consent to suit. *Dolan* v. *United States Postal Serv.*, 126 S. Ct. 1252, 1260 (2006) (declining to enlarge one of the FTCA's exceptions to waiver). That principle is even more "unhelpful" with respect to the Tucker Act, which confers jurisdiction over "any" claim arising from "any" contract, without exception.

Taken as a whole, the plain language of the Tucker Act evinces congressional intent to make the Court of Federal

Claims available for claims against the United States for breach of "*any*" contract—"indiscriminately of whatever kind." *Gonzales*, 520 U.S. at 5. And the lower courts' holding that petitioner's suit is nevertheless barred by a judge-made "sovereign capacity" exception conflicts with this Court's decisions on the meaning of the word "any."[6]

B. The decisions below conflict with this Court's holdings that jurisdictional statutes must be applied according to their plain terms.

The decisions below conflict not only with *Brogan* and *Rucker*, but also with this Court's teaching that jurisdictional statutes must be applied according to the terms that Congress prescribed. The decisions below do not even purport to apply the literal terms of the Tucker Act, contrary to the basic proposition that courts should look to the plain text of a statute to determine its meaning. This error is compounded by the fact that the Tucker Act is a *jurisdictional* statute. Congress alone holds the power to determine the kinds of cases that lower federal courts should decide, see U.S. Const. art. III, and those courts cannot restrict their own jurisdiction by creating nontextual exceptions to jurisdictional statutes.

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[6] There can be no doubt that the Stipulated Order is a "contract" for purposes of Tucker Act jurisdiction. See *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("a consent decree or order is to be construed for enforcement purposes basically as a contract); *Hansson* v. *Norton*, 411 F.3d 231, 232 (D.C. Cir. 2005) ("[t]his court generally treats settlement agreements as contracts subject to the exclusive jurisdiction of the Court of Federal Claims"); *Massie* v. *United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999) (holding that a settlement agreement resolving the plaintiff's medical-malpractice claim against the Department of the Navy satisfied the Tucker Act). Indeed, the Court of Federal Claims did not doubt that the Stipulated Order is a "contract"; rather, it concluded that the Stipulated Order is not the *right kind of contract* to support Tucker Act jurisdiction.

1. The plain language of the Tucker Act was cast aside when *Kania* first asserted, without citing any authority, that "[t]he contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of minds." 650 F.2d at 268. According to the court in *Kania*, jurisdiction under the Tucker Act is appropriate only "where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves." *Ibid.*

Kania does not purport to apply the plain meaning of the statute but rests on the court's assessment of what "Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued." *Ibid.* Yet the court cited no authority for its conclusion that Congress "undoubtedly had in mind" a waiver of sovereign immunity more limited than the waiver it wrote into the statute. Instead, the court in *Kania* simply imposed a gloss on the plain language of the statute based on unsupported speculation about congressional intent.

2. This analysis cannot withstand scrutiny under this Court's rules of statutory interpretation. "The starting point in discerning congressional intent is the existing statutory text." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). Indeed, there is a "strong presumption" that "the plain language of the statute expresses congressional intent," and this presumption is rebutted "only in rare and exceptional circumstances * * * when a contrary legislative intent is clearly expressed." *Ardestani* v. *INS*, 502 U.S. 129, 135-136 (1991) (quotations and citations omitted); see *United States* v. *Lanier*, 520 U.S. 259, 267 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself * * * *"). Thus, "when the statute's language is plain, the sole function of the courts—at least where the disposi-

tion required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534.

As we have shown, the plain language of the Tucker Act confers jurisdiction over "any" breach-of-contract claim, whether or not the United States made the contract in its sovereign capacity. The "sole function" of the court in *Kania*—and the court in this case—was to enforce the Act according to its terms and decide the breach-of-contract claim on its merits.

3. *Kania*'s abandonment of the plain text of the statute is all the more troublesome because the statute at issue defines the court's own jurisdiction. It is a "settled proposition" in this Court's decisions that "the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'" *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) (quoting *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845)). "Congress has the constitutional authority to define the jurisdiction of the lower federal courts, and once the lines are drawn, limits upon federal jurisdiction * * * must be neither disregarded nor evaded." *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) (quotations and citation omitted).

Keene itself demonstrates this Court's commitment to the statutory text in determining the Court of Federal Claims' subject-matter jurisdiction. The plaintiff there filed two complaints against the United States in the Court of Federal Claims, seeking to recoup money it had paid to defend and settle certain asbestos claims. *Id.* at 202. "When it filed each complaint, however, Keene had a similar claim pending against the Government in another court." *Ibid.* This was fatal to Keene's claims, because Congress had provided that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. The plaintiff argued that this restriction

on the court's jurisdiction resulted in an undue hardship, but this Court rejected that contention, explaining that "the proper theater for such arguments, * * * is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims. We enjoy no liberty to add an exception * * * to remove an apparent hardship, and therefore enforce the statute." 508 U.S. at 217-218 (quotations and citations omitted).

Just as this Court "enjoy[ed] no liberty to add an exception" to the statute *limiting* the Court of Federal Claims' jurisdiction, the court below was not permitted to create a "sovereign capacity" exception to the statute *conferring* jurisdiction. Indeed, 28 U.S.C. § 1500 shows that Congress knows how to limit the jurisdiction of the Court of Federal Claims when it wishes to do so. As *Keene* makes clear, Congress alone is empowered to determine the subject-matter jurisdiction of the Court of Federal Claims. That court has no authority to close its doors to claims that Congress has assigned to it.

In sum, the Court of Federal Claims was not permitted to "restrict the unqualified language of [the] statute" defining its subject-matter jurisdiction. *Brogan*, 522 U.S. at 403. "[A]s a jurisdictional statute," the Tucker Act "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (quotations omitted). The "sovereign capacity" exception is neither precise nor faithful to the plain terms of the Tucker Act, and it should be retired.[7] Accordingly, this Court should grant the petition

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[7] As we have shown, the Court of Federal Claims and the Federal Circuit broke new ground when they manufactured the "sovereign capacity" exception. In this case, they have expanded that exception to reach contracts made in connection with *civil* cases. The "sovereign capacity" exception was created in the *criminal* context, see *Kania*, 650 F.2d at 265-269, and almost all the decisions applying the exception involve contracts made in that context, *e.g.*, *Sanders* v. *United States*, 252 F.3d 1329 (Fed. Cir. 2001); *Awad*, 61 Fed. Cl. 281; *Houston* v. *United States*, 60

to reject the lower courts' unwarranted, judge-made "sovereign capacity" exception and vindicate the Tucker Act's unambiguous grant of subject-matter jurisdiction.

II. The Decisions Below Conflict With Decisions Of The D.C. Circuit.

Just as the decisions below conflict with this Court's command to apply jurisdictional statutes according to their plain terms, they also conflict with recent decisions of the D.C. Circuit in similar breach-of-settlement cases. In two recent cases, the D.C. Circuit has held that claims by individuals against the United States Department of Agriculture ("USDA") for breach of litigation-related settlement agreements should have been brought in the Court of Federal Claims.

The plaintiff in the first case, *Shaffer* v. *Veneman*, 325 F.3d 370 (D.C. Cir. 2003), settled a race-discrimination claim with the USDA, agreeing to opt out of a pending class action against the agency in return for the agency's canceling his outstanding debt on USDA loans and other benefits. *Id.* at 371. When the USDA later denied a loan application submitted by the plaintiff, he filed a lawsuit in the United States District Court for the District of Columbia, alleging various breaches of the settlement agreement by the USDA. *Id.* at 371-372. The district court ruled that it lacked subject-matter jurisdiction because (1) the Tucker Act confers upon the Court of Federal Claims jurisdiction over claims for breach of contract against the United States and (2) the settlement agreement was a contract for purposes of the Tucker Act. *Id.* at 372. The D.C. Circuit affirmed, stating that "[t]here appears to be no doubt that the Court of Federal Claims could entertain this case under the Tucker Act, for the purpose of which a settlement agreement is considered a contract." *Id.* at 372, 374.

Fed. Cl. 507 (2004); *Bailey* v. *United States*, 54 Fed. Cl. 459 (2002); *Bloemker*, 229 Ct. Cl. 690.

Similarly, the plaintiff in *Brown* v. *United States*, 389 F.3d 1296 (D.C. Cir. 2004) (*per curiam*), entered into a settlement agreement with the USDA to resolve her Title VII claims against the agency. The plaintiff later brought suit for breach of that agreement. On appeal from the dismissal of the plaintiff's complaint, the D.C. Circuit explained that "[i]n order for Brown either to pursue remedies for breach of contract or to seek relief under Title VII, she must first prove the Department breached the settlement agreement. And because this contract question arises in a suit against the United States for more than $10,000 in damages, jurisdiction to decide whether the Department breached the settlement agreement lies *exclusively* in the Court of Federal Claims." *Id.* at 1297 (emphasis added).

Thus, the D.C. Circuit has squarely held that private plaintiffs' claims for breach of settlement agreements with federal agencies should have been brought in the Court of Federal Claims.[8] The D.C. Circuit did not apply the "sovereign capacity" exception that the Federal Circuit applied in this case. Instead, it simply applied the plain language of the Tucker Act and concluded that claims for breach of a settlement agreement are claims for breach of a contract and thus are covered by the Act. The Court should grant this petition to resolve the conflict between the decisions below and these decisions of the D.C. Circuit.

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[8] Following *Shaffer* and *Brown*, the United States District Court for the District of Columbia has dismissed breach-of-settlement claims against various federal agencies, concluding that jurisdiction was proper *only* in the Court of Federal Claims. See, *e.g.*, *Davis* v. *Veneman*, 2006 WL 2024981, at *3 (D.D.C. July 17, 2006) (USDA); *Pritchett* v. *Abraham*, 2006 WL 543994, at *1 n.3 (D.D.C. Mar. 6, 2006) (Department of Energy); *Ficken* v. *Rice*, 2006 WL 123931, at *7 (D.D.C. Jan. 17, 2006) (Department of State); *Greenhill* v. *Spellings*, 2005 WL 3508653, at *2-*3 (D.D.C. Dec. 22, 2005) (Department of Education).

III. The Decisions Below Involve An Important Federal Question That Should Be Decided By This Court.

This Court's review is all the more necessary because the decisions below will affect virtually *every* breach-of-contract claim asserted against the United States under the Tucker Act and its companion statute, the Little Tucker Act. As a result of such widespread application of the "sovereign capacity" exception, private parties will be forced to deal with the United States without knowing whether they have an avenue for redress in the event of a breach. And because the Federal Circuit has exclusive jurisdiction over appeals from the Court of Federal Claims, the decision below represents the governing interpretation—or misinterpretation—of the Tucker Act and can only be corrected by this Court.

1. The analysis employed by the Court of Federal Claims and the Federal Circuit in this case applies to every Tucker Act case commenced in the Court of Federal Claims. In 2004-2005, 452 breach-of-contract complaints were filed in the Court of Federal Claims, accounting for more than 27 percent of that court's total filings. See Administrative Office of the U.S. Courts, *2005 Annual Report of the Director: Judicial Business of the United States Courts* 309 (Table G-2A) (2006). Indeed, contract disputes comprised the single largest portion of the Court of Federal Claims' docket that year (other than vaccine compensation cases). *Ibid.*

Under the decisions below, the court in each of these cases would have to determine whether the United States made the contract at issue in its sovereign or its proprietary capacity.[9] And because this doctrine purports to limit

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[9] Given the fact that the United States "performs no 'proprietary' functions" but acts in its sovereign capacity whenever it takes action within its constitutional authority, *Federal Land Bank of Wichita* v. *Board of County Comm'rs,* 368 U.S. 146, 150-

subject-matter jurisdiction—the court's "power to adjudicate the case"—the issue cannot be waived and must be decided *sua sponte* if neither party raises it. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); see *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449, 453 (1900).

2. The decisions below will also affect cases arising under the Little Tucker Act, which uses the same phrase—"any express or implied contract"—at issue in this case. The Little Tucker Act gives federal district courts "original jurisdiction concurrent with the United States Court of Federal Claims" over claims "not exceeding $10,000 in amount, founded * * * upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). District courts considering such claims are bound by the decisions of the Federal Circuit. See *United States* v. *Hohri*, 482 U.S. 64, 68 (1987) (pursuant to 28 U.S.C. § 1295(a)(2), "the Federal Circuit has exclusive appellate jurisdiction of a case raising *only* a nontax claim under the Little Tucker Act"). And as they follow the Federal Circuit's lead in this area, district courts will at least consider the Court of Federal Claims' decisions interpreting identical statutory language in the Tucker Act. See, *e.g.*, *C.H.* v. *Sullivan*, 920 F.2d 483, 485 (8th Cir. 1990) (acknowledging *Kania* in dictum in a Little Tucker Act case); *United States* v. *Zajanckauskas*, 346 F. Supp. 2d 251, 254-259 (D. Mass. 2003) (holding that *Kania* did not apply to a Little Tucker Act claim arising from the breach of a non-criminal immunity agreement).[10]

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151 (1961), it is likely that the Court of Federal Claims would dismiss many of these breach-of-contract claims.

[10] The Court of Federal Claims in this case declined to follow *Zajanckauskas*, stating that "nothing in the *Kania* court's reasoning limited the sovereign capacity doctrine exclusively to so-called 'criminal' as opposed to 'civil' contracts." Pet. App. 13a-15a.

Because *Kania* purports to establish the scope of Congress' waiver of federal sovereign immunity with respect to breach-of-contract claims, its reasoning applies with equal force to claims under the Little Tucker Act. Indeed, one federal district court has applied *Kania*'s "sovereign capacity" exception to bar a claim under the Little Tucker Act. *Roudnahal* v. *Ridge*, 310 F. Supp. 2d 884, 894-895 (N.D. Ohio 2003) ("[u]nless a plaintiff can demonstrate that an agreement clearly subjects the government to monetary liability, a claim for breach by the government in its sovereign capacity is outside the waiver of sovereign immunity"). Thus, whether the claim seeks more or less than $10,000, *Kania* and the decisions below impose an additional, and unjustified, barrier to federal jurisdiction.

3. This additional layer of jurisdictional analysis only complicates an otherwise straightforward procedure for filing a claim against the United States. Any party that enters into an agreement with the United States—including a litigation-related agreement—does so with an expectation that the United States will honor its agreement. But any prudent contracting party must anticipate a breach, and the availability of a judicial remedy for breach informs that party's assessment of the proposed agreement. A private party might well forego dealing with the United States if it knows that there will be no opportunity for judicial review of the United States' performance under the contract.

In the Tucker Act, Congress provided an avenue for relief where the United States breaches its agreements—a suit for damages in the Court of Federal Claims. The decisions below, however, rewrite the statute in a manner that forecloses judicial review in many cases and leaves private parties uncertain whether they can enforce their agreements with the United States.

4. This Court's review is especially important given that the Federal Circuit's misinterpretation of the Tucker Act cannot be corrected in other cases brought in other circuits. That is because the Court of Federal Claims has

exclusive jurisdiction over breach-of-contract claims against the United States for more than $10,000, see *Clinton* v. *Goldsmith*, 526 U.S. 529, 539 n.13 (1999), and the Federal Circuit has *exclusive* jurisdiction over appeals from the Court of Federal Claims, see 28 U.S.C. § 1295(a)(3). Only this Court can resolve the jurisdictional problems created by the "sovereign capacity" exception, and it should exercise its supervisory authority to do so.

Such review would be in keeping with this Court's usual practice in cases arising from the Federal Circuit. Indeed, the Court has not hesitated to review decisions from the Federal Circuit—including Tucker Act decisions—where necessary to vindicate statutory requirements, even in the absence of a circuit conflict. *E.g.*, *eBay Inc.* v. *MercExchange LLC*, 126 S. Ct. 1837 (2006) (Patent Act); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (Indian Tucker Act); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (Indian Tucker Act); *Franconia Assocs.* v. *United States*, 536 U.S. 129 (2002) (Tucker Act); *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) (Court of International Trade jurisdiction); *Hercules, Inc.*, 516 U.S. 417 (Tucker Act); *Keene Corp.*, 508 U.S. 200 (Tucker Act); *Mitchell*, 463 U.S. 206 (Tucker Act).

The Court should grant this petition to reaffirm the jurisdictional boundaries marked out by Congress in the Tucker Act and thus to ensure that private parties can deal with the United States against a backdrop of clear rules for dispute resolution. Just as the Court granted certiorari to decide whether the Court of Claims had jurisdiction to issue declaratory judgments, see *King*, 395 U.S. at 2, so the Court should grant this petition to decide whether the Court of Federal Claims can dismiss breach-of-contract claims against the United States under a judge-made "sovereign capacity" exception to the Tucker Act. This question, no less than the question presented in *King*, is "both substantial and important." *Ibid.*

* * * * *

This Court should grant the petition to reaffirm that the subject-matter jurisdiction of the Court of Federal Claims is defined by the plain terms of the Tucker Act, unlimited by a lower court's suppositions about congressional intent. Under the jurisdictional scheme that Congress enacted, and under the D.C. Circuit's approach to similar claims, petitioner is entitled to his day in the Court of Federal Claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

05-263 C
Filed September 26, 2005
TO BE PUBLISHED

KEVIN TRUDEAU, Plaintiff, v. UNITED STATES, Defendant.	Subject matter jurisdiction, breach of contract, stipulated order settling Federal Trade Commission enforcement action, sovereign capacity, proprietary capacity, *Kania*, *Sanders*

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OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on defendant's motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC") for lack of subject matter jurisdiction or, in the alternative, pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. Oral argument was deemed unnecessary. For the reasons set forth below, defendant's motion to dismiss pursuant to RCFC 12(b)(1) is GRANTED.

BACKGROUND[1]

I. Nature of the Case

The case arises from a dispute regarding the wording of a press release issued by the Federal Trade Commission ("FTC") to announce the settlement of a civil enforcement action against plaintiff Kevin Trudeau for false advertising in violation of the Federal Trade Commission Act.

At the time the enforcement act was filed, Mr. Trudeau was in the business of selling various self-help and health-related products, principally through radio and television "infomercials," which are relatively long commercials in the format of television programs. *See Webster's New College Dictionary* 369 (2001). In particular, Mr. Trudeau promoted a dietary supplement named Coral Calcium Supreme, which he advertised would cure cancer, among other diseases. In January 1998, the FTC filed a complaint against Mr. Trudeau in the District Court for the Northern District of Illinois, alleging that this product did not provide the advertised benefits and that Mr. Trudeau had engaged in false and deceptive

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[1] Unless otherwise indicated, the facts set forth in this section are either undisputed or alleged and assumed to be true for the purposes of the defendant's motion.

trade practices. The FTC's suit concluded when the parties reached a settlement agreement, which was embodied in a Stipulated Final Order entered by the District Court for the Northern District of Illinois on September 2, 2004 ("the Stipulated Order"). The Stipulated Order provided the FTC with injunctive relief, including a broad prohibition of the type of infomercial that had led to the enforcement action. In addition, Mr. Trudeau was prohibited from manufacturing, distributing, promoting or offering for sale any products containing coral calcium. However, the Stipulated Order stated:

> Defendants * * * expressly deny any wrongdoing or liability for any of the matters alleged in the Complaint and the civil contempt action. There have been no findings or admissions of wrongdoing or liability by the Defendants * * * other than the finding against Kevin Trudeau for contempt of Part I of the Stipulated Preliminary Injunction, entered by the Court on June 29, 2004.

Compl. Ex. A at 3-4. On September 7, 2004, the FTC issued a press release on its website regarding the settlement with Mr. Trudeau. This press release forms the basis for Mr. Trudeau's claims in this litigation.

In his complaint, Mr. Trudeau characterizes the district court's Stipulated Order as a contract within this Court's Tucker Act jurisdiction. He alleges that the FTC's press release breached the contract's implied covenant of good faith and fair dealing because it announced that the settlement constituted an admission of wrongdoing by Mr. Trudeau, thereby depriving Mr. Trudeau of the benefits of the agreement. *See* Compl. ¶ 2. Mr. Trudeau seeks an unspecified amount of money damages for business injuries resulting from the alleged breach of the Stipulated Order.

The United States moves to dismiss Mr. Trudeau's complaint for lack of subject matter jurisdiction pursuant

to RCFC 12(b)(1) or, in the alternative, for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6). Defendant argued that "the Stipulated Order, if contractual at all, was entered into by the United States in its sovereign capacity,[2] and thus, falls outside this Court's limited Tucker Act jurisdiction." Def. Br. at 3. Additionally, the Government argued that the "Court lacks jurisdiction because the district court has expressly retained jurisdiction to enforce the Stipulated Order upon which Mr. Trudeau bases his claim." *Id.* Alternatively, the Government contended that Mr. Trudeau had failed to state a claim upon which relief can be granted because the Stipulated Order did not impose any implied duties upon the FTC and, even if it did, no reasonable view of the facts alleged in the complaint could establish that the FTC breached the contract in the manner alleged by Mr. Trudeau. *Id.* at 4.

II. Statutory and Regulatory Background

The FTC is an independent agency of the United States created by the Federal Trade Commission Act ("FTC Act" or "Act"), 15 U.S.C. §§ 41-58 (2000). Among other responsibilities, the FTC enforces sections 5 and 12 of the FTC Act. Section 5(a) declares unlawful "unfair or

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[2] The sovereign capacity doctrine is distinct from the sovereign acts doctrine. The sovereign capacity doctrine provides that the United States Court of Federal Claims lacks jurisdiction over certain contracts that the Government makes in its sovereign capacity. *Kania v. United States*, 227 Ct. Cl. 458, 464, 650 F.2d 264, 267-68 (1981). In contrast, the sovereign acts doctrine is a merits-based affirmative defense under which the United States, when sued as a party to a contract, "cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Allegre Villa v. United States*, 60 Fed. Cl. 11, 16 (2004) (quoting *Horowitz v. United States*, 267 U.S. 458, 461 (1925)). The Government's motion to dismiss "does not assert the sovereign acts doctrine." Def. Reply at 9.

deceptive acts or practices in or affecting commerce" and empowers the Commission to prevent such acts or practices. 15 U.S.C. § 45(a)(1), (2). Section 12 prohibits the dissemination of "any false advertisement" in order to induce the purchase of "food, drugs, devices, or cosmetics." 15 U.S.C. § 52(a)(2). The Act defines "false advertisement" as "an advertisement, other than labeling, which is misleading in a material respect." 15 U.S.C. § 55.

A false advertisement under section 12 constitutes an unfair or deceptive act or practice within the meaning of section 5. 15 U.S.C. § 52(b). False advertising is also made a criminal offense if committed in connection with the sale of injurious products or "with intent to defraud or mislead," and is punishable by a fine of not more than $5,000 and imprisonment for not more than six months. 15 U.S.C. § 54.

The Act authorizes the FTC, through its own attorneys and/or the Attorney General, to initiate civil actions in federal district court to enjoin violations of the FTC Act. *See* 15 U.S.C. §§ 53(b), 56(a). In such cases, the district court's authority to issue injunctive relief carries with it the full range of equitable remedies, including consumer redress and disgorgement of profits. *See FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996).

III. Statement of Facts

A. The FTC's Enforcement Efforts Against Mr. Trudeau

For several years, the FTC sought relief against Mr. Trudeau, alleging that his infomercials misled consumers about cures for serious diseases, such as cancer and multiple sclerosis, as well as common conditions, such as hair loss and obesity. The Stipulated Order resolved two cases that the FTC had filed against Mr. Trudeau dating back to 1998. Specifically, in 1998, and again in 2003, the FTC filed actions against Mr. Trudeau and other defendants in

the United States District Court for the Northern District of Illinois, alleging that the marketing of various specified products violated sections 5 and 12 of the FTC Act. Compl. ¶ 7; *FTC v. Trudeau*, No. 98-0168 (N.D. Ill.) (Filed Jan. 12, 1998); *FTC v. Trudeau, et al.*, No. 03-3904 (N.D. Ill.) (Filed June 9, 2003). In the 2003 suit, the FTC alleged that Mr. Trudeau violated the FTC Act by falsely claiming that one product, a dietary supplement named Coral Calcium Supreme, could cure cancer, multiple sclerosis, lupus, heart disease, high blood pressure, and other diseases. Compl., Ex. B.

In connection with both actions, which were consolidated, the FTC sought injunctive relief and redress for consumers. The FTC also sought preliminary relief and, in July 2003, the court entered a stipulated preliminary injunction that prohibited Mr. Trudeau from making any of the claims for Coral Calcium Supreme that the FTC had challenged. Compl., Ex. A at 2; Ex. B at 1. Despite the preliminary injunction, Mr. Trudeau continued making the challenged claims with respect to Coral Calcium Supreme and, on June 29, 2004, the Honorable Robert W. Gettleman of the United States District Court for the Northern District of Illinois found Mr. Trudeau in civil contempt for violating the preliminary injunction by continuing to advertise Coral Calcium Supreme as an effective cure for cancer. Compl., Ex. A at 2; Ex. B at 1.

B. The Stipulated Order

Two months later, the parties entered into a settlement agreement, which was embodied in the Stipulated Order issued by Judge Gettleman on September 2, 2004. Compl., Ex. A. The Stipulated Order resolved (1) the FTC's attempt to have Mr. Trudeau held in contempt of the 1998 Order; (2) the FTC's request for additional remedial measures in connection with Mr. Trudeau's failure to comply with the preliminary injunction; and (3) the FTC's 2003 complaint. Compl., Ex. A at 2.

In the Stipulated Order, Mr. Trudeau agreed to a permanent injunction that essentially granted the FTC all the equitable relief it sought, including a broad prohibition of the type of infomercial that had led to the lawsuits. *Id.* at 7-10. Among other things, the Stipulated Order prohibited Mr. Trudeau "from producing, disseminating, making or assisting others in making any representation in an infomercial aired or played on any television or radio media * * *." Compl., Ex. A at 8. The Stipulated Order contained a limited exception to the prohibition, specifying that:

> This * * * does not prohibit Defendants from making any representation in any television or radio media in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any book, newsletter or other informal publication in any format *provided* that such book, newsletter or other informal publication: 1) does not reference, directly or indirectly, any branded or trademarked product, program or service that Defendants are promoting; 2) is not, directly or indirectly, an advertisement for any product, program or service; and 3) is not sold, promoted, or marketed, directly or indirectly, with any product, program, or service that is related to the content of the book, newsletter, informal publication or infomercial.

Id.

The Stipulated Order also prohibited Mr. Trudeau "from manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of any product containing coral calcium * * *," or from making any representation regarding benefits, performance, or efficacy of any product, program or service unless such representation was true and not misleading. *Id.* at 10-11. Moreover, the Stipulated Order reflected Mr. Trudeau's agreement to pay "equitable monetary relief" in the amount of $2 million, which relief included, but was not limited to,

"consumer redress." *Id.* at 16. Finally, the Stipulated Order also provided that the United States District Court for the Northern District of Illinois retained jurisdiction to interpret, enforce, and modify the order. Compl., Ex. A at 29.

C. The FTC Press Release

On September 7, 2004, the FTC issued a press release announcing the settlement, which was posted on the agency's website. Compl. ¶ 10 & Ex. B. The release is headed "Kevin Trudeau Banned from Infomercials," with a subheading "Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape." *Id.*, Ex. B at 1. The first paragraph explains that, pursuant to the settlement, Mr. Trudeau is broadly banned from appearing in, producing, or disseminating future infomercials that advertise any type of product, service, or program to the public, except for truthful infomercials for informational publications. *Id.* It also states that he "agreed" to these prohibitions and to pay $2,000,000 to "settle" the charges the FTC had brought. *Id.* The next paragraph explains the manner in which Mr. Trudeau would satisfy the monetary judgment. *Id.* The third paragraph quotes the Acting Director of the FTC's Bureau of Consumer Protection, Lydia Parnes, as stating: "This ban is meant to shut down an infomercial empire that has misled American consumers for years." *Id.* Ms. Parnes also stated: "Other habitual false advertisers should take a lesson; mend your ways or face serious consequences." *Id.*

The fourth paragraph detailed what the FTC "alleged," and was followed by a paragraph describing what the court "found" regarding Mr. Trudeau's contempt of the 2003 preliminary injunction. *Id.* The sixth and seventh paragraphs provided additional detail regarding the terms of "the settlement announced today." *Id.* Finally, the press release closed with the following statement:

> NOTE: This stipulated final order is for settlement purposes only and does not constitute an admission by the defendants of a law violation. A stipulated final order has the force of law when signed by the judge.

Id. at 2.

D. Mr. Trudeau's Complaints Regarding the Press Release

On February 16, 2005, Mr. Trudeau requested that the FTC withdraw the press release from its website and issue a corrective retraction. Compl. ¶ 27 & Ex. C. Mr. Trudeau asserted that the press release indicated that the district court had found him liable for wrongdoing, when in fact the Stipulated Order stated that there had been no findings or admissions of liability on his part. *Id.* For this reason, Mr. Trudeau asserted that the press release "effectively deprived [him] of the bargained-for benefits" of the settlement agreement embodied in the Stipulated Order. Compl. ¶ 2. The FTC denied Mr. Trudeau's request by letter dated February 22, 2005, citing the statement in the press release that the Stipulated Order was for settlement purposes only and that Mr. Trudeau's settlement did not constitute an admission of a violation of law. Compl. ¶ 28 & Ex. D.

Mr. Trudeau now seeks judicial relief. He does not press his claim, however, in the United States District Court for the Northern District of Illinois, which was the court that entered and retained jurisdiction to enforce the Stipulated Order. Instead, on February 28, 2005, Mr. Trudeau filed his complaint in this Court. At the same time, he filed a complaint in the United States District Court for the District of Columbia seeking relief pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA").

In his APA suit, Mr. Trudeau sought declaratory and injunctive relief—namely, the rewording of the press release. On August 25, 2005, the United States District

Court for the District of Columbia granted the FTC's motion to dismiss Mr. Trudeau's complaint on the ground that the court was without jurisdiction to review his claims. *Trudeau v. FTC*, 384 F. Supp. 2d 281, 288-89 (D.D.C. 2005). Specifically, the district court held that it lacked jurisdiction over Mr. Trudeau's APA claim because the press release at issue was not a "final agency action" under section 704 of the APA. *Id.* at 289-91. In the alternative, the court concluded that Mr. Trudeau's claims—a First Amendment retaliation claim and a claim that the FTC had exceeded its authority to issue press releases under 15 U.S.C. § 46(f)—should be dismissed for failure to state a claim upon which relief can be granted. *Id.* at 288-89, 294-98.

Mr. Trudeau argues that because the claim pending before this Court is based on a contract rather than the APA and seeks money damages rather than injunctive relief, the district court's jurisdictional holding "is hardly * * * authoritative." Pl.'s Resp. To Def.'s Notice of Additional Auth. at 3. He also contends that the district court's statement that "[f]airly read, the press release is not inaccurate or misleading at all," 384 F. Supp. 2d at 292-93, "is dictum" and "does not bind this Court." Pl.'s Resp. To Def.'s Notice of Additional Auth. at 2 n.2.

In his case before this Court, Mr. Trudeau characterizes the Stipulated Order as a "contract" within this Court's Tucker Act jurisdiction. He alleges that the FTC's press release "breached" the Stipulated Order, and he seeks an unspecified amount of money damages for injuries to his business resulting from the alleged breach. Specifically, Mr. Trudeau alleges that the press release and resulting articles have created a public perception that he is a "habitual false advertiser," which has adversely affected sales of his books and publications. Compl. ¶ 26.

DISCUSSION

I. Standard of Review on Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Court must address the issue of subject matter jurisdiction before any others, *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994), and it must dismiss a complaint "when it lacks the statutory or constitutional power to adjudicate the case." *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996). However, when this court hears such a jurisdictional challenge, "its task is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (overruled, on other grounds, by *Davis v. Scherer*, 468 U.S. 183 (1984)). "The issue is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

The court must accept as true the facts alleged in the complaint, and must construe such facts in the light most favorable to the pleader. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (holding that courts are obligated "to draw all reasonable inferences in plaintiff's favor"); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). "If, however, the motion challenges the truth of the jurisdictional facts alleged in the complaint, the court may consider relevant evidence in order to resolve the factual dispute." *McDonald v. United States*, 37 Fed. Cl. 110, 113 (1997); *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999) ("Fact-finding is proper when considering a motion to dismiss where the jurisdictional facts in the complaint * * * are challenged."). Once the court's subject matter jurisdiction is put into question, it is "incumbent upon [the plaintiff] to come forward with evidence establishing the court's jurisdiction. [The plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds*, 846 F.2d at 748; *see also McNutt v. General Motors Acceptance Corp.*,

298 U.S. 178, 189 (1936) ("If [plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.").

II. The Government Was Acting in Its Sovereign Capacity When It Agreed to Entry of the Stipulated Order in Connection With the Settlement of the FTC Action

This Court's subject matter jurisdiction under the Tucker Act extends to "claims against the United States founded * * * upon any express or implied contract with the United States." 28 U.S.C. § 1491 (2000). The Tucker Act, however, merely confers jurisdiction on this court, "it does not create any substantive right enforceable against the United States for money damages." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Testan*, 424 U.S. 392, 398-99 (1976)).

"The contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of the minds." *Kania v. United States*, 227 Ct. Cl. 458, 464, 650 F.2d 264, 268 (1981). The jurisdiction of the Court of Federal Claims does not extend to contracts entered into by the Government in its sovereign capacity that do not unmistakably subject the United States to damages in the event of breach. *Id.* at 464-65, 650 F.2d at 268, *see also Silva v. United States*, 51 Fed. Cl. 374, 377, *aff'd*, 51 Fed. Appx. 12 (Fed. Cir. 2002) (unpub.). In *Awad v. United States*, the Court of Federal Claims explained that:

> [t]he two main categories of contracts that the government makes are often referred to as proprietary and sovereign. *See Doe v. United States*, 37 Fed. Cl. 74, 77 (1996). The United States generally has waived sovereign immunity with regard to proprie-

> tary contracts, which are contracts in which "the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves." *Kania*, [227 Ct. Cl. at 464,] 650 F.2d at 268; *see also Bloemker v. United States*, 229 Ct. Cl. 690, 692-93 (1981). In contrast, the government has not waived sovereign immunity for contracts that it makes in its sovereign, or governmental capacity. *See Kania*, [227 Ct. Cl. at 464,] 650 F.2d at 268.

61 Fed. Cl. 281, 284 (2004).

Plaintiff argues that the sovereign capacity doctrine as set forth in *Kania* applies only in the criminal context. Alternatively, plaintiff contends that the "sovereign / propriet[ary] distinction in *Kania* [has been recast as] a distinction between civil and criminal contracts to which the United States is a party." Pl. Br. at 20 (quoting *United States v. Zajanckauskas*, 346 F. Supp. 2d 251, 257 (D. Mass. 2003)). Relying on *Zajanckauskas*, 346 F. Supp. 2d at 258, in which the District of Massachusetts adopted the distinction between civil and criminal contracts as the basis for determining which government contract claims are cognizable under the Tucker Act, plaintiff argues that the sovereign capacity doctrine is inapplicable to this case because Mr. Trudeau's contract with the Government did not arise in the criminal context.

This Court is not bound by the opinion of the District of Massachusetts, and we decline to follow the decision in *Zajanckauskas*. Recent decisions of the Court of Federal Claims have continued to rely upon *Kania* and its progeny in holding that the relevant distinction is between government contracts entered into in a proprietary or sovereign capacity rather than whether a particular contract arose in a criminal or civil context. See *Awad v. United States*, 61 Fed. Cl. at 284; *Bailey v. United States*, 54 Fed. Cl. 459, 482-83 (2002) ("The existence of a crimi-

nal case does not make all related contracts actions of the sovereign * * * ."). If *Zajanckauskas* were correct, there would be no need for the Court of Federal Claims to continue to analyze whether contracts were entered into by the Government in its sovereign capacity. *See Pappas v. United States*, 66 Fed. Cl. 1, 7 (2005); *Awad*, 61 Fed. Cl. 281; *Houston v. United States*, 60 Fed. Cl. 507 (2004); *see also Miller v. United States*, 67 Fed. Cl. 195, 200 (2005) ("this court lacks jurisdiction over claims, such as plaintiff's treaty law claim, in which the government acts in its sovereign capacity").

To be sure, many of the contracts at issue in the *Kania* line of cases arose in the criminal context, *i.e.*, plea agreements, immunity agreements, and witness protection agreements. *Pappas*, 66 Fed. Cl. 1; *Silva*, 51 Fed. Cl. 374; *Sadeghi v. United States*, 46 Fed. Cl. 660 (2000); *Drakes v. United States*, 28 Fed. Cl. 190 (1993); *Grundy v. United States*, 2 Cl. Ct. 596 (1983); *Kania*, 227 Ct. Cl. 458, 650 F.2d 264. The *Kania* line of cases stands for the proposition that "activities of the criminal justice system * * * without question, lie at the heart of sovereign action." *Silva*, 51 Fed. Cl. at 377. However, the court in *Kania* did not draw a "civil/criminal" distinction in deciding whether the Tucker Act waived sovereign immunity for Mr. Kania's claim. *Kania*, 227 Ct. Cl. 458, 650 F.2d 264. In fact, in applying the sovereign capacity doctrine, the court relied on a principle frequently invoked in civil matters that "[t]he claimant for money damages for breach of an express or implied in fact contract must show that the officer who supposedly made the contract had authority to obligate appropriated funds."[3] *Id.* at 465, 650 F.2d at 268. The court then stated:

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[3] In *Kania*, the court found that the plaintiff had not made any attempt to show that the Government official at issue had the authority to make an agreement obligating the Government to pay money or specifying how the liability of the Government should be determined. *Id.* at 465, 650 F.2d at 268.

> By the same line of reasoning, we would deem it possible to make a binding contract subject to Tucker Act jurisdiction, creating a liability for breach of a plea bargaining agreement or one to grant immunity for giving testimony, or to protect a witness. But, in such case, the court would look for specific authority in the AUSA to make an agreement obligating the United States to pay money, and spelling out how in such a case the liability of the United States is to be determined.

Id. at 465, 650 F.2d at 268. The court noted that in the criminal context, the need for specificity was "the greater because the role of the judiciary in the high function of enforcing and policing the criminal law is assigned to the courts of general jurisdiction and not to this court." *Id.* However, nothing in the *Kania* court's reasoning limited the sovereign capacity doctrine exclusively to so-called "criminal" as opposed to "civil" contracts.

Alternatively, plaintiff contends that, even if *Kania* and cases following it were originally premised upon a sovereign/proprietary distinction, the Federal Circuit's decision in *Sanders v. United States*, 252 F.3d 1329 (Fed. Cir. 2001), "significantly recast" *Kania*'s holding and "made clear that a 'sovereign capacity' defense is available only in the criminal context." Pl. Br. at 17, 19-20. The Court of Appeals in *Sanders* did not undertake to overrule *Kania*, nor could it without reconsidering that decision en banc. *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368, 1373 (Fed. Cir. 2000) ("Court of Claims cases, until overturned by [the Federal Circuit] en banc, are binding precedent"); *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) ("[W]e deem it fitting, necessary, and proper to adopt an established body of law as precedent. That body of law represented by the holdings of the Court of Claims and the Court of Customs and Patent Appeals announced before the close of business on September 30, 1982 is most appli-

cable * * * ."). Also, because the agreements in both *Kania* and *Sanders* were concerned with the conduct of the parties in a criminal case, it would have been unnecessary and illogical for the *Sanders* court to "recast" *Kania*'s holding. Thus, even if the opinion in *Sanders* contained language that one might argue was intended to "recast" the distinction between sovereign and proprietary capacities, such language would have been dicta, not binding precedent. *See Co-Steel Raritan, Inc. v. International Trade Comm'n*, 357 F.3d 1294, 1307 (Fed. Cir. 2004). The holdings of *Kania* and *Sanders* are therefore consistent, and do not suggest that the application of the sovereign capacity doctrine should be limited to contracts arising in the criminal context.[4]

As indicated above, the Court of Federal Claims has followed *Kania* and its progeny in relying upon the sovereign/proprietary distinction. In *Awad v. United States*, the court declined jurisdiction and found that the issuance of a passport and granting of citizenship were actions undertaken by the Government in its sovereign capacity. 61 Fed. Cl. at 284-85. In that case, the Court of Federal Claims affirmed that "[t]his court has jurisdiction

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[4] To the extent plaintiff argues that *Kania* and its progeny are wrongly-decided, *see* Pl. Br. at 21, this Court is required to follow Federal Circuit precedent. *See Crowley v. United States*, 398 F.3d 1329, 1335 (Fed. Cir. 2005) ("[T]he Court of Federal Claims may not deviate from the precedent of the United States Court of Appeals for the Federal Circuit any more than the Federal Circuit can deviate from the precedent of the United States Supreme Court. Trial courts are not free to make the law anew simply because they disagree with the precedential and authoritative analysis of a reviewing appellate court."). There are only two "narrow exceptions" to that principle, neither of which is applicable here: if the circuit's precedent is expressly overruled by statute or by a subsequent Supreme Court decision. *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005). Otherwise, a circuit court decision controls until the circuit court overrules it en banc. *Id.*

over most proprietary contracts, but generally does not have jurisdiction over contracts that the government makes in its sovereign capacity." 61 Fed. Cl. at 284. The *Awad* court's focus on distinguishing between contracts entered into in the Government's sovereign and proprietary capacities indicates that *Sanders* did not alter the outcome-determinative nature of that distinction.

The Court notes that the *Awad* decision has been the subject of recent criticism based on reasoning that "[t]he only reason for granting the sovereign immunity from suit is to prevent interference with sovereign affairs. Allowing a suit for money damages is not that type of case." *Dealing with the Sovereign: Risky Business*, 18 Nash & Cibinic Report 53 (2005); *see also Postscript: Dealing With the Sovereign*, 19 Nash & Cibinic Report 6 (2005) ("By a similar logic, the government could argue that the Tucker Act * * * disallows the Court of Federal Claims (and boards) from hearing disputes on fighter aircraft, submarine, and major weapons systems because there is no 'private analogue'.") (quoting *Awad*, 61 Fed. Cl. at 284). However, prior to *Awad*, *Kania* set forth the following justification for holding the Government liable for contracts entered into in its proprietary capacity: "If the government insists on making itself the sole judge of law and fact in all disputes between its contractors and itself, the prices and terms it receives will compare unfavorably with those that [parties] obtain in [a] purely private transaction." *Kania*, 227 Ct. Cl. at 464, 650 F.2d at 268. Clearly, this justification is not applicable when the Government acts in its sovereign capacity, undertaking exclusively governmental functions without a private counterpart. *See Awad*, 61 Fed. Cl. at 284. Furthermore, the relevant question is not whether there is a private counterpart to the specific good or service purchased by the Government, but rather whether the Government has "step[ped] off the throne and engag[ed] in the purchase and sale of goods, lands and services * * * ." *Kania*, 227 Ct. Cl. at 464, 650 F.2d at 268. As explained in *Bailey*:

> Prisons are related to the sovereign action of incarcerating persons convicted in the criminal justice system. The act of building the prison, however, is not a sovereign act but an act in which the sovereign has stepped off the throne and has engaged in the purchase of goods, lands and services.

54 Fed. Cl. at 483.

Having determined that the sovereign capacity doctrine is not limited to government contracts that arise in a criminal context, the Court must address whether the Government was acting in its sovereign capacity when it agreed to entry of the Stipulated Order upon which Mr. Trudeau bases his claim. The Government's action against Mr. Trudeau was a civil enforcement action. The Government was seeking to enforce a statute that, although not criminal, was specifically designed to protect the public from conduct that is illegal. The criminal context may be the paradigm case, but it is not the exclusive context in which the Government may enter into a contract in its sovereign capacity.

The FTC engages in law enforcement activities, such as enforcing the Nation's consumer protection laws, to prevent unfair or deceptive acts or practices in commerce. The sine qua non for this activity is protection of the public. *See FTC v. Klesner*, 280 U.S. 19, 27 (1929) ("to justify the Commission in filing a complaint under section 5, the purpose must be protection of the public"); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1313 (D.C. Cir. 1968) ("the basic purpose of the Act is the protection of the public"); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 991 n.18 (D.C. Cir. 1973) ("[T]he Commission's role as both guardian and spokesman of the public interest has unquestioned vitality.") (citations omitted).

In order to permit the FTC to discharge its responsibilities, Congress vested the Commission with broad dis-

cretionary powers that are akin to prosecutorial functions. *See Klesner*, 280 U.S. at 27 (FTC exercises "functions of both prosecutor and judge"); *Holloway*, 485 F.2d at 991 ("The Commission was entrusted with a broad responsibility and discretion, prosecutorial in part, judicial in part * * * ."). For this reason, courts have uniformly held that there is no implied private right of action under the FTC Act. *See, e.g., Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981); *Naylor v. Case and McGrath, Inc.*, 585 F.2d 557, 561 (2d Cir. 1978). As explained by the Court of Appeals in *Holloway*, "there is need to weigh each action against the Commission's broad range policy goals and to determine its place in the overall enforcement program of the FTC." *Holloway*, 485 F.2d at 997 (citations omitted). Because such functions are uniquely governmental in character, Congress created the FTC as the "exclusive enforcement authority" for violations of section 5. *Id.* at 998.

The purported contract upon which Mr. Trudeau relies was allegedly created when the FTC agreed to entry of the Stipulated Order in connection with the settlement of its enforcement action against Mr. Trudeau. The FTC initiated that action to prevent deceptive acts or practices and false advertising in violation of sections 5 and 12 of the Act. The FTC's purpose when it initiated, litigated, and later settled, the enforcement action was clear: to protect the public against deception by ensuring, through the remedies afforded by the FTC Act, that advertising conveys truthful information to the public.

By agreeing to entry of the Stipulated Order, the FTC vindicated this public interest. In so doing, it plainly did not "step[ ] off the throne and engage[ ] in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves." *Kania*, 227 Ct. Cl. at 464, 650 F.2d at 268. The FTC did not receive goods or services in exchange for its agreement to entry of the Stipulated Order,

but instead obtained for the public a measure of protection against the dangers of false advertising. The FTC's efforts to obtain this relief, in and for the public interest, were undertaken by the Government in its sovereign, not proprietary, capacity.

III. The Stipulated Order Did Not Contain an Unmistakable Promise to Subject the United States to Monetary Liability

The fact that the Government acted in its sovereign capacity, however, is not necessarily fatal to plaintiff's claim. In *Kania*, the Court of Claims held that a claim for money damages for the breach of a contract entered into by the Government in its sovereign capacity may be maintained if there is "specific authority * * * to make an agreement obligating the United States to pay money, and spelling out how in such a case the liability of the United States is to be determined." *Kania*, 227 Ct. Cl. at 465, 650 F.2d at 268. In *Sanders*, the Federal Circuit explained that liability on such a claim "could only exist if there was an unmistakable promise to subject the United States to monetary liability. This would require the same kind of express language (in both written and oral agreements) required by the unmistakability doctrine concerning government liability for the exercise of sovereign power." 252 F.3d at 1336.[5]

In this case, the purported contract between Mr. Trudeau and the United States does not "clearly and unmistakably" provide that the United States is liable for monetary damages in the event of breach. Instead, the

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[5] The unmistakability doctrine recognizes that "'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'" *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 536 n.57 (2005) (quoting *Bowen v. Pub. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)).

purported contract is a judicial decree that restrains and enjoins Mr. Trudeau from engaging in certain business activities and practices. It contains no provision for the payment of money damages in the event of a breach by the Government. To the contrary, the "contract" embodied in the Stipulated Order is an instance where "monetary compensation by the government was not contemplated in the [a]greement * * * and was not contemplated as a remedy in the event of a breach." *Pappas*, 66 Fed. Cl. at 8. Accordingly, the purported contract did not spell out how such compensation was to be determined in the event of breach.

Because the Government, through the FTC, was acting in a sovereign capacity when it agreed to entry of the Stipulated Order and because plaintiff has failed to establish that the Stipulated Order contained an unmistakable promise to subject the United States to monetary liability in the event of a "breach" of that Order, *see Sanders*, 252 F.3d at 1336, this Court lacks subject matter jurisdiction over plaintiff's breach of contract claim.

IV. The Court Need Not Address the Other Arguments Set Forth in Defendant's Motion to Dismiss

In its motion to dismiss, the Government argued that the district court's retention of jurisdiction over enforcement of the Stipulated Order divests this Court of jurisdiction over plaintiff's breach of contract claim. Def. Br. at 20-22. Having determined that we lack subject matter jurisdiction over that claim, the Court need not address the effect of the district court's retention of jurisdiction. The Court likewise need not address defendant's alternative arguments in support of its motion to dismiss plaintiff's complaint pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss for lack of subject matter jurisdiction is GRANTED. The Clerk is directed to enter judgment dismissing plaintiff's complaint pursuant to RCFC 12(b)(1).

IT IS SO ORDERED.

/s/

GEORGE W. MILLER
Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

06-5004

KEVIN TRUDEAU

Plaintiff-Appellant,

v.

UNITED STATES

Defendant-Appellee.

JUDGMENT

On Appeal from the UNITED STATES COURT OF FEDERAL CLAIMS

In CASE NO(S). 05-CV-263

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (GAJARSA, Circuit Judge, CLEVENGER, Senior Circuit Judge, and PROST, Circuit Judge)

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

/s/

DATED June 13 2006

Jan Horbaly, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 15, 2006.

FOR THE COURT,

/s/

_____

Jan Horbaly
Clerk

Dated: 09/08/2006

cc: Eric L. Hirschhorn
Brian M. Simkin

TRUDEAU V US, 2006-5004
(CFC-05-CV-263)